No._____

In The
Supreme Court of the United States

John Doe #1, **John Doe #2**, and **Protect Marriage Washington**, *Petitioners*

v.

Sam Reed et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari

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Question Presented

The district court granted a preliminary injunction protecting against public disclosure, as opposed to private disclosure to the government only, of those signing a petition to put a referendum on the ballot ("petition signers"). The Ninth Circuit reversed, concluding that the district court based its decision on an incorrect conclusion of law when it determined that public disclosure of petition signers is subject to, and failed, strict scrutiny. The questions presented are:

1. Whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying information about petition signers.

2. Whether compelled public disclosure of identifying information about petition signers is narrowly tailored to a compelling interest, and whether Petitioners met all the elements required for a preliminary injunction.

Parties to the Proceeding

Petitioners in this Court, Plaintiffs-Appellees below, are John Doe #1, an individual, John Doe #2, an individual, and Protect Marriage Washington, a state political committee and proponent of Referendum 71.

Respondents in this Court, Defendants-Appellants below, are Sam Reed, in his official capacity as Secretary of State of Washington, and Brenda Galarza, in her official capacity as Public Records Officer for the Secretary of State of Washington.

Additional Respondents in this Court, Defendants-Intervenors-Appellants below, are Washington Coalition for Open Government, and Washington Families Standing Together.

Corporate Disclosure Statement

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock.

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Petition

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Doe v. Reed*, __ F.3d __, 2009 WL 3401297 (9th Cir. 2009).

Opinions Below

The appellate order reversing the district court (App. 1a) is reported at __ F.3d __, 2009 WL 3401297 (9th Cir. 2009). The district court's order and opinion granting a preliminary injunction (App. 23a) is unreported.

Jurisdiction

The appellate court's order (App. 1a) was filed on October 15, 2009. The appellate court's opinion and judgment (App. 3a) was filed on October 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The following are appended: First Amendment (App. 46a); Fourteenth Amendment (App. 46a); Washington Constitution, article II, § 1(b); Revised Code of Washington ("RCW") § 29A.68.011 (App. 47a); RCW § 29A.72.200 (App. 48a); RCW § 29A.72.230 (App. 49a); RCW § 29A.72.240 (App. 50a); RCW § 29A.84.210 (App. 51a); RCW § 29A.84.230 (App. 51a); RCW § 29A.84.250 (App. 52a); RCW § 42.17.010 (App. 53a); RCW § 42.56.001 (App. 55a); RCW § 42.56.010 (App. 56a); and RCW § 42.56.070 (App. 56a).

Statement of the Case

On May 18, 2009, Washington Governor Christine Gregoire signed Engrossed Second Substitute Senate Bill 5688.[1] (App. 29a.) It expands the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses. (App. 29a.) It is commonly called the "everything but marriage" domestic partnership bill. (App. 7a.)

In Washington, such bills may be put to a referendum with sufficient signatures. Wash. Const. art. II, § 1(b). The petition forms used provide room for twenty signatures per page and require name, signature, home address, city, county, and (optional) email address. (App. 30a.)

Petitioner Protect Marriage Washington circulated a petition on Senate Bill 5688, designated Referendum 71. (App. 29a.) On July 25, Protect Marriage Washington submitted over 138,500 signatures to the Secretary of State ("Secretary"). (App. 20a.) Petitioners John Doe #1 and John Doe #2 signed the petition. The Secretary conducted an extensive canvass and verification of the petition signatures, determining that Referendum 71 qualified for the November 3 ballot.[2]

Washington's statutory scheme has protections for petition signer confidentiality. Referendum petitions are not made public by the statute that

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[1] Additional facts are in the district court Opinion. (App. 23a.)

[2] The signature verification process has been the subject of lawsuits during the pendency of this action, but none of the state court actions involve the issues presented here.

regulates referenda and initiatives, *see* RCW § 29A.72.010 *et seq*., and proponents and opponents may have observers at the Secretary's verification, but observers may not make any record of names, addresses, or other information on the petitions. RCW § 29A.72.230 (observers may "make no record of the names, addresses, or other information on the petitions . . . .").[3] Where the Secretary determines that the collected signatures are inadequate (and a court confirms, if appeal is taken), the petition is destroyed. RCW § 29A.72.200. So the names and other information of petition signers are divulged to the proponents of the referendum and the government for a very limited purpose—to ensure that there is sufficient public support for a referendum to justify placing it on the ballot and to allow public officials to verify the petition signatures.

For decades, and until just recently, public officials in Washington have repeatedly reaffirmed the confidentiality of petition signatures. Attorney general opinions from 1938 and 1956 stated that referendum petitions were not subject to public disclosure. Wash. Op. Att'y Gen. 378 (1938) (App. 61a); Wash. Op. Att'y Gen. 55-57 No. 274 (1956) (App. 63a). Even after the Public Records Act ("PRA") was enacted, RCW § 42.56.001 *et seq*., then-

[3] Citizens need not see the signatures to appeal the verification process to the Court system. They need only express dissatisfaction. RCW § 29A.72.240 ("Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters may . . . apply to the superior court of Thurston County for a citation requiring the secretary of state to submit the petition to said court for examination . . . .").

Secretary of State Kramer declared that the petitions were not subject to public release, *see* A. Ludlow Kramer, Letter to State Senator Hubert F. Donohue, July 13, 1973 (App. 66a), because "the release of these signatures [has] no legal value, but could have deep political ramifications to those signing." A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973. (App. 67a.)[4]

Although historically such petitions have not been considered public records, the current Secretary considers referendum petitions public records under the Public Records Act and thereby subject to public disclosure under RCW § 42.56.070. Absent the stay issued by this Court, the petitions would have been subject to release to requesting groups.[5]

Among those requesting a petition copy under the PRA are KnowThyNeighbor.org and WhoSigned.org, who have publicly stated their intent to place the names and addresses of those who signed Referendum 71 on the Internet (App. 31a), and to make the names searchable, with the goal of encouraging individuals to have "personal" and "uncomfortable" conversations with petition signers. (App. 31a.)

On July 28, 2009, Petitioners filed suit in the district court seeking declaratory and injunctive

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[4] The position that these are not public records was upheld by state courts. *See Neale v. Cheney*, No. 48733 (Wash. Sup. Ct. Thurston County, Sept. 14, 1973).

[5] Because of a temporary restraining order in a State case, the Secretary of State, out of caution, did not release the records between the time the Ninth Circuit issued their Stay, and when this Court vacated that Stay.

relief to prevent public release of petition signers' names and contact information.

In Count I of their complaint, Petitioners claimed that the PRA is unconstitutional, as applied to referendum petitions, because it violates the First Amendment free speech and association rights by not being narrowly tailored to a compelling state interest. (App. 24a.)

In Count II, Petitioners alleged that the PRA is unconstitutional as applied because "there is a reasonable probability that the signatories . . . will be subjected to threats, harassment, and reprisals." (App. 24a.) This reasonable-probability test was established in *Buckley v. Valeo*, 424 U.S. 1 (1976), and applied in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), and subsequent cases.

The State Respondents ("State") support the release of petition signers' names and contact information to facilitate these "conversations"—by disclosing petition signers' names and contact information—in light of a growing amount of evidence, which the State acknowledges, that these are not "conversations" at all, but "confrontations." Petitioners submitted numerous declarations from Washington, California, and across the country illustrating the sort of confrontations that have already occurred to those whose names are publicly associated with Referendum 71 or other similar ballot measures. For instance, Larry Stickney, the campaign manager for Protect Marriage Washington, has received an email death threat telling him to avoid areas of Washington, and another email threatening to hurt his family. Stickney has taken these threats seriously,

making his family sleep in an interior living room for safety and reporting threats to the sheriff.

On September 10, the district court, after extensive briefing by the parties and intervenors, and a preliminary injunction hearing, issued a preliminary injunction preventing the release of petition signers' names and contact information. (App. 23a.) The district court applied strict scrutiny and held that the Petitioners were likely to succeed on the merits and meet the other preliminary injunction elements. (App. 43a.)

On September 14, the State, followed later by intervenors, appealed to the Ninth Circuit, which consolidated their appeals.[6] (App. 10a.) The State asked the Ninth Circuit to stay the preliminary injunction pending appeal, overturn the preliminary injunction, and expedite in light of the November 3 election. (App. 10a.) The Ninth Circuit expedited the appeal and held oral argument on October 14. (App. 11a.)

On October 15, the Ninth Circuit issued an Order staying the preliminary injunction, effective immediately, and providing no reasoning[7] or stay of its Order (to allow for seeking a stay), both of which made it impossible to seek en banc review. (App. 1a; 10a.) Because of the Order's immediate effectiveness, the State could have, at any time, released the names of the petition signers to the public, causing irreparable harm to the First Amendment rights to free political

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[6] Intervenor Washington Coalition for Open Government filed a brief at the Ninth Circuit. Washington Families Standing Together did not file a separate brief.

[7] The closest the Ninth Circuit came to any reasoning was its statement that the District Court "relies on an incorrect legal standard." (App. 2a.)

speech, privacy, and association of the petition signers.[8]

Petitioners expeditiously sought a stay from this Court to prevent public release of petition signers' names and contact information. A stay was granted by Justice Kennedy (October 19) and then the full Court (October 20), pending resolution of a timely filed petition for writ of certiorari. (App. 21a, 22a.)

On October 22, the Ninth Circuit issued its opinion, applying intermediate scrutiny and finding anti-fraud and informational interests sufficient to justify making petition signers public. (App. 20a.) It neither considered Count II (which the district court did not reach because it decided for Petitioners on Count I) nor remanded for consideration of Count II (and, in any event, there was no time to do so because the Ninth Circuit immediately stayed the district court's preliminary injunction). (App. 10a.)

Reasons to Grant the Petition

I. The Decision Below Involves an Important Question of Law That Should Be Decided by this Court.

While this case involves the reversal of the grant of a preliminary injunction,[9] at its heart lies the First Amendment free speech and association issue of whether, when the sovereign people seek to put a

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[8] The Secretary did not publicly discloses petition signers' names and contact information because of state court litigation.

[9] This case also provides an opportunity to address the application of the preliminary-injunction standards in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), in a speech-protective manner to the First Amendment context. *See infra* at 29-31.

referendum on the ballot, they may be constitutionally compelled to *publicly* disclose identifying information about *themselves* and their *support* for placing the measure on the ballot, or whether any State interests are satisfied by *private* disclosure.

The issue is arising with great frequency across the country as changes in technology have made it possible for individuals and groups seeking to prevent public debate from occurring to obtain the names and contact information of petition signers and post that information online to encourage harassment and intimidation. *See, e.g.*, http://knowthyneighbor.org/ (searchable databases with petition-signer information on marriage issues in Arkansas, Florida, Massachusetts, and Oregon). This petition process itself is widespread in the United States. Twenty-seven states have either an initiative process, a referendum process, or both. Initiative and Referendum Institute, *I & R Factsheet*, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/Handout%20-%20What%20is%20IR.pdf. The number of signatures required to put a referendum petition on a ballot differs from state to state, and can require the signatures of a large number of individuals. For example, Washington requires that a referendum petition contain signatures equal to or exceeding four percent of the votes cast for governor at the previous gubernatorial election. Wash. Const., art. II, § 1(b). In contrast, in Idaho a referendum petition must contain the signatures of six percent of the qualified electors at the time of the last general election. Idaho Code Ann. § 34-1805 (2009).

This is an important question of law that has not been, but should be, decided by this Court.

A. Petitioners Had Likely Success on the Merits.

As should happen in First Amendment cases, the district court's grant of a preliminary injunction and the appellate court's reversal turned on their holdings as to the likelihood of success on the merits. The other preliminary-injunction elements (*see infra*) essentially follow the finding on this element.

1. Public Disclosure Here Implicates First Amendment Privacy of Speech, Association, and Belief and Constitutes Compelled Speech.

As we are reminded in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (Roberts, C.J., joined by Alito, J.) ("*WRTL-II*"),[10] it is vital to begin with the First "Amendment itself: 'Congress shall make no law . . . abridging the freedom of speech.' The Framers' actual words put these cases in proper perspective." *Id.* at 482 (*quoting* U.S. Const. amend. I).

The First Amendment includes a right to speak and associate, along with a right of privacy in one's speech, association, and belief. *See Buckley*, 424 U.S. at 64 ("compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"), *id.* at 66 ("the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations"), 75 ("strict standard of scrutiny" required "for the right of associational privacy").

In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and *Buckley v. American Constitutional*

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[10] This opinion ("*WRTL-II*") states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

Law Foundation, 525 U.S. 182 (1999) ("*Buckley-II*"), this Court addressed compelled public disclosure in violation of First Amendment privacy. Two types of public disclosure were at issue in each case: (1) public disclosure of one's *identity* and (2) public disclosure about one's *belief* that a measure should be defeated or put on the ballot. In *McIntyre*, Mrs. McIntyre was not required by the government to publicly disclose her belief that a referendum should be defeated (a belief that she disclosed by distributing handbills at public meetings), but she objected to public disclosure of her identity on her handbills, if she did so. 514 U.S. at 337-38. In *Buckley-II*, paid petition circulators were compelled to both solicit petition signers and publicly identify themselves in order to qualify a measure for the ballot. 525 U.S. at 186.

The present case is more like *Buckley-II*, where petition signers are subject to compelled public disclosure of *both* their identity and belief. Petitioners object to the public disclosure of both their *identity* and their *belief* that Referendum 71 should be placed on the ballot. They claim their First Amendment privacy right against public disclosure of their speech, association, and belief.[11]

While First Amendment privacy protection against compelled public disclosure of identity and belief does

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[11] Absent a compelling interest, government may not compel speech. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (display of state motto); *Miami Herald Publishing Comp. v. Tornillo*, 418 U.S. 241 (1974) (newspaper publication of candidate reply); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (disclosure of membership lists for tax purposes absent showing group is subject to licensing or tax requirement); *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (schoolchildren flag salute).

not depend on the reason why one asserts the protection, this Court has identified reasons for asserting the protection. This Court said that the desire not to be compelled to speak by public disclosure while participating in the political process "may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. These reasons inform the following analysis.

Viewing Washington's referendum qualification process from the perspective of compelled speech, those engaging their right to associate and speak for the purpose of putting a referendum on the ballot are faced with three levels of compelled speech.

First, Washington compelled 120,577 people[12] to speak and associate by signing petitions to qualify a referendum. There are less burdensome means for qualifying referenda, but the State's system is not challenged here. This signing of petition sheets is a private disclosure of identity and belief, not a public one. Just as the Framers who published the Federalist Papers without publicly disclosing themselves had to privately associate with a printer and colleagues for the purpose of printing, binding, and distributing their pamphlets, those seeking to qualify a referendum associate privately with others. Petition signers disclose their identity to a petition circulator, who is

[12] This is the number of individuals equal to four percent of those who voted for governor in Washington's last gubernatorial election, and is the number required by the Washington Constitution for a referendum to qualify for placement on the ballot. Wash. Const. art II, § 1(b). Petitioners submitted an excess number of signatures to ensure they obtained a sufficient number of signatures to appear on the ballot.

acting as the agent of the referendum proponents. Petition signers also disclose their identity to potentially nineteen other persons signing petition sheets containing twenty names, as they associate together to get the referendum on the ballot. And petition signers disclose their identity to the referendum proponents who collect and review the petition sheets before submitting them to the Secretary. Regarding *McIntyre*'s "desire to preserve as much of one's privacy as possible," 514 U.S. at 342, this is a minimal, private disclosure necessary to advance the common cause of qualifying the referendum for the ballot. Regarding *McIntyre*'s "fear of economic or official retaliation [or] . . . concern about social ostracism," *id.* at 341, this private disclosure poses little risk because the proponents, the circulator, and the other persons signing on the same petition sheet share the common cause of getting the referendum on the ballot.

Second, the petition signers and other members of the private association seeking to place the referendum on the ballot are compelled to speak when they submit the signatures to the Secretary for canvass and verification. This is no longer totally private speech and association, but it is "public" only in the sense that it is revealed to a public official (the Secretary) and those directly involved in the canvass and verification. It is not disclosure of identity and belief to the general public. Here also there is little concern about giving up privacy or of social ostracism or retaliation because of the statutory protections, such as the fact that a government official retains the compelled information, observers of the canvass and verification may not write down any of the disclosed information, review of verification (if requested) is done confidentially by a court, and if the referendum is not qualified then the

petition sheets are destroyed. *See supra* 2-4. Compelling this minimal disclosure to the government is justified by the interests the State has in not bearing the expense of putting issues on the ballot that have little public interest and in not requiring others to participate in this election absent such support.

Third, the petition signers are compelled to speak to the public, disclosing their identity and beliefs, if the petitions are released to the public. Suddenly one's privacy of speech and association vanishes and the concerns about social ostracism and retaliation rush forward. The question addressed in this case is whether the government can justify this level of compelled speech.

Important to the analysis is the distinction between private disclosure to the government and public disclosure. This distinction is illustrated in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), a case involving an FEC investigation of campaign-finance complaints against the AFL-CIO, the Democratic National Committee ("DNC"), and others. The FEC compiled numerous internal documents detailing information about volunteers, members, employees, activities, and political strategy that it then planned to make public pursuant to its rule requiring public release of investigation materials in closed cases. The union and DNC "assert[ed] that releasing the names of hundreds of volunteers, members, and employees w[ould] make it more difficult for the organizations to recruit future personnel." *Id.* at 176.[13] The court's analysis empha-

[13] In addition to this future chill, the court noted that disclosure of strategies to opponents would "frustrate the organizations' ability to pursue their political goals effectively." *AFL-CIO*, 333 F.3d at 177.

sized the private-public distinction: "[E]ven when requiring disclosure of political speech activities to a *government agency* may be necessary to facilitate law enforcement functions, we have held that '[c]ompelled *public* disclosure presents a separate first amendment issue' that requires a separate justification." *Id.* at 176 (*quoting Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986) (emphasis added by *AFL-CIO*). The Court held that the public-disclosure rule violated the First Amendment. The transferrable concept is that private (to the government) disclosure sufficed for government enforcement purposes and public disclosure was unjustifiable and in violation of First Amendment speech and association rights. Petitioners assert that any interests that Washington has may be met by private disclosure to the government. *See infra.*

Where a government authority is charged with overseeing core political activity, its activity must be carefully scrutinized. This was affirmed in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), which noted that the creation of such an authority as the FEC "raises weighty constitutional objections, and its authority to exercise control over an area where 'uninhibited, robust, and wide open' activity is constitutionally protected was approved by the Supreme Court only after being meticulously scrutinized and substantially restricted." *Id.* at 387 (citation omitted). In the present case, where the Secretary is charged with regulating core political activity by the people in their sovereign capacity, the Secretary's policy of public disclosure policy bears specially strict scrutiny and special justification.

Compelling public disclosure of one's speech, association, and belief requires special justification because

"[m]erely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of government interference . . . ." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In the present case, compelled public disclosure likewise forces a petition signer to disclose "past expressions and associations." *Id.* The fact that the present public disclosure is marginally less direct than being summoned as a witness matters not because "[g]overnment action may be subject to constitutional challenge even though it only has an indirect effect on the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972). "The fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of first amendment rights as imprisonment, fines, injunctions, or taxes." *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950). "It is axiomatic that when the actions of government officials so directly affect citizens' First Amendment rights, the officials have a duty to take the least intrusive measures necessary to perform their assigned functions." *White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000). "In making their First Amendment claim, Plaintiffs were obligated to prove only that the officials' actions would have chilled or silenced 'a person of ordinary firmness from future First Amendment activities,' not that their speech and petitioning were 'actually inhibited or suppressed.'" *Id.* at 1241 (citation omitted).

From the foregoing, it is clear that compelled public disclosure of the identity and belief of petition signers

burdens speech, association, and belief that the First Amendment was meant to protect. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This compelled speech is no mere ministerial, procedural matter dealing with the administration of elections. It is core political speech highly protected by the First Amendment.

This is borne out by this Court's referendum jurisprudence. *See generally Buckley-II*, 525 U.S. at 182; *McIntyre*, 514 U.S. at 345-46*; Meyer v. Grant*, 486 U.S. at 422, 425 (1988); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) ("*CARC*"); *Bellotti*, 435 U.S. at 765. In each case, the law implicated protected expression. *See Buckley-II*, 525 U.S. at 186-87 ("circulation is 'core political speech'"); *McIntyre*, 514 U.S. at 345-46 (not election mechanics but regulates speech); *Meyer*, 486 U.S. at 421 ("circulation . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change"); *CARC*, 454 U.S. at 294-95 ("practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."); *Bellotti*, 435 U.S. at 785-86 (corporate right to engage in political speech regarding initiative). *See also Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1030-31 (9th Cir. 2009) (compelled disclosure is protected speech in ballot-initiative context)*; Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 (9th Cir. 2003) (same) ("*CPLC-I*")*; Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985) (circulation is protected speech); *Hegarty v. Tortolano*, No. Civ.A. 04-11668-RWZ, 2006 WL 721543, *2 (D. Mass. Mar. 17, 2006) ("signing a petition . . . constitutes speech").

2. Strict Scrutiny Was Required.

In considering applicable scrutiny, the district court recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Buckley-II*, 525 U.S. at 187 (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)). It noted that "government may infringe on an individual's rights to free speech but only to the extent that such infringement is narrowly tailored to serve a compelling government interest." (App. 38a (*citing McIntyre*, 514 U.S. at 346-47).) This agrees with this Court's holding that when a law restricts "core political speech" or "imposes 'severe burdens' on speech or association," the law must be narrowly tailored to serve a compelling government interest. *See Buckley-II*, 525 U.S. at 206-09 (Thomas, J., concurring) (laws implicating "core political speech" or imposing substantial burdens on First Amendment rights are always subject to strict scrutiny). *See also Buckley-II*, 525 U.S. at 192 n.12 (strict scrutiny required); *Buckley*, 424 U.S. at 64 ("[C]ompelled disclosure cannot be justified by a mere showing of some legitimate government interest. . . . [It] must survive exacting scrutiny. . . .").

"Exacting scrutiny," as used in *Buckley*, is "strict scrutiny." *Buckley* required "exacting scrutiny" of compelled disclosure provisions, *id.* at 64, which it called the "strict test," *id.* at 66, and by which it meant "strict scrutiny." *See WRTL-II*, 551 U.S. 449, n.7 (2007) (*Buckley*'s use of "exacting scrutiny," 424 U.S. at 44, was "strict scrutiny"); *see also McIntyre*, 514 U.S. at 347 (*citing Bellotti*, 435 U.S. at 786) (equating "exacting" scrutiny with "strict" scrutiny). In *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008), this Court said that

"exacting scrutiny" requires that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." Here, given the serious harm to free speech and association from public disclosure, the scrutiny must be strict. Moreover, "there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," *id.* (citation omitted), which nexus simply does not exist here, especially given the anemic nature of asserted interests. *See infra.*

That the cost of disclosure is high has become more clear since *Buckley* was decided. *See* 424 U.S. at 67, 72, 83 (concluding that "sunlight is said to be the best of disinfectants" without the benefit of any research as to the effect of disclosure on First Amendment rights). Subsequent courts and disclosure advocates have seized upon this language and often fail to ask whether disclosure is narrowly tailored to serve a compelling government interest; they often treat disclosure, or often "transparency," as a meaningful end in itself and ignore the substantial First Amendment burdens.[14] Time, experience, and studies have revealed the true costs inflicted by disclosure and suggest that it may be time reemphasize the importance of applying strict scrutiny to each application of a disclosure statute.

In 2007, the Institute for Justice commissioned one of the *first* studies to analyze the effects of disclosure

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[14] *See*, *e.g.*, David Ammons, *Who Signs R-71? Foes May Post it Online*, Wash. Sec'y of State Blogs, June 2, 2009) (*available at* http://www.blogs.secstate.wa.gov/FromOurCorner/index.php/2009/06/who-signs-r-71-foes-may-post-it-online/)(discussing State's commitment to "transparency"). David Ammons is the Communications Director for the Secretary.

on freedoms of speech, association, and belief. *See* Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (available at http://www.ij.org/publications/other/disclosurecosts.html) ("*Disclosure Costs*"). While the study involved campaign *finance* disclosure provisions, its findings illustrate the disconnect between public perception and actual evidence regarding disclosure.

Carpenter's study is important because it probed respondents beyond their general sentiments about disclosure statutes. Thus, consistent with prior surveys, Carpenter reported that nearly 80% of respondents favored the disclosure of the identities of individuals contributing to a ballot measure campaign.[15] *Id.* at 7. However, unlike prior surveys, Carpenter went a step further and probed respondents about the specifics of disclosure statutes. For example, when the issue was personalized, support waned significantly. *Id.* Only 40% felt that their own name and address should be included and fewer still (24%) felt that the name of their employer should ever be required. *Id.* And nearly 60% of respondents indicated that they would think twice before contributing if it meant that their name and address would be released to the public. *Id.* Even those who strongly supported disclosure indicated that

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[15] Respondents were asked to state how they felt about the following statement. "The government should require the identities of those who contribute to ballot issue campaigns to be available to the public." The results are consistent with the findings of David Binder, relied upon by the court in *California Pro-Life Council, Inc. v. Randolph*, 507 F. 3d 1172 (9th Cir. 2007), where 71% of respondents felt that it was important to know the identities of individuals that contributed to a ballot measure committee. *Id.* at 1179.

they would be less likely to contribute if their own personal information would be released. *Id.*

Among reasons for not wanting personal information released, respondents cited a desire to remain anonymous, fear of retaliation (personal and economic), and that public disclosure would take away their right to a secret ballot. *Id.* Carpenter also explored how the public uses the publicly disclosed information and concluded:

> The vast majority of respondents possessed no idea where to access lists of contributors and never actively seek out such information before they vote. At best, some learn of contributors through passive information sources, such as traditional media, but even then only a minority of survey participants could identify *specific* funders of campaigns related to the ballot issue foremost in their mind. . . . Such results hardly point to a more informed electorate as a result of mandatory disclosure.

Id. at 13. *See also* Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, The Independent Review, 578 (Spring 2009) (available *at* http://www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf) (exploring further how the public fails to use disclosure reports). Thus, disclosure provisions do little to address the problem of voter ignorance described in *Buckley*, 424 U.S. at 68, while imposing substantial burdens on the First Amendment rights to privacy in speech, association, and belief.

Supplementing Carpenter's studies are real-world examples of harms resulting from disclosure provisions

during recent elections.[16] *See*, *e.g.*, Brief of *Amicus Curiae* Alliance Defense Fund in Support of Appellant at 16, *Citizens United v. FEC*, No. 08-205 (U.S. 2009) (discussing reprisals against donors supporting California's Proposition 8 in 2008); Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009) (available at http://www.heritage.org /Research/Family/bg2328.cfm) (same).

Petitioners here fear that similar reprisals will be directed at petition signers, especially in light of the threats and harassment already directed at individuals connected to the Referendum 71 campaign. *Supra* 5.

Technology has also dramatically altered the disclosure environment considered by this Court in *Buckley*. In theory, government records under the PRA were "public" in 1976, but access meant a trip to a governmental office during normal business hours. (App. 61a (Initiative 276 § 28 1972)). To search through records an individual had to manually flip

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[16] Evidence of social costs associated with compelled public disclosure was part of the record in *McConnell v. FEC*, 251 F. Supp. 2d 176, 227-229 (D.D.C. 2003) (per curiam). Evidence ranged from numerous contributions at just below the disclosure trigger amount, to vandalism after public disclosure, to non-contribution because of concerns about a group's ability to retain confidentiality, to concerns about employers, neighbors, other business entities, and others knowing of support for causes not popular everywhere and the results of such disclosure. *Id.*; William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1 (2003); James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections:* Davis*,* White*, and the Future of Judicial Campaign Financing*, 86 Denv. U. L. Rev. 195, 218-20 (2008) (discussing disclosure burdens).

through records stuffed into a filing cabinet.[17] And it was often cost-prohibitive for an individual to obtain copies of the records. *See* Brian Zylstra, *The disclosure history of petition sheets*, Wash. Sec'y of State Blogs, Sept. 17, 2009 (*available at* http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/).

Today, records are kept in computer databases. Copies cost a nominal fee, are provided in electronic format, and can be uploaded to the Internet in searchable databases almost instantly. *See*, *e.g.*, http://knowthyneighbor.org (stating Washington is "Up Next"). Once on the internet, the information can be combined with publicly available phone numbers and maps. *See*, *e.g.*, *Prop. 8 Maps*, http://www.eightmaps.com.

In today's "information age," courts cannot ignore the tremendous invasions of privacy that occur when the government compels disclosure and allows it to become part of the public record. For example, the Federal Rules of Civil Procedure now require litigants to redact certain personal identifying information because of identity theft concerns. Fed. R. Civ. P. 5.2. The rule goes further, allowing parties to move, for good cause, to redact additional information and limit or prohibit non-parties' electronic access to filed documents. *Id*.

However, the concerns here go far beyond identity theft. An employer no longer has to visit a government office building during normal business hours to learn

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[17] For example, Protect Marriage Washington submitted over 9,000 petitions sheets containing the names and other personal information of 138,000 individuals. (App. 7a.)

who among her employees supported a particular referendum—she can do it from the comfort of her office. The same can be said about curious customers, suppliers, or neighbors. Furthermore, recent elections demonstrate how individuals use disclosure reports to harass and intimidate individuals simply exercising their First Amendment right to engage in the political process. As Kim Alexander, president of the California Voter Foundation, recently said, "This is not really the intention of voter disclosure laws. But that's the thing about technology. You don't really know where it is going to take you." Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009).

Because of these disclosure burdens on free speech, expression, and belief, "exacting scrutiny" is strict scrutiny or its equivalent should be applied. Under strict scrutiny, Washington bears the burden of proving that the PRA, as applied to public disclosure of petition signers' identity and beliefs, is narrowly tailored to a compelling interest. *See WRTL-II*, 551 U.S. at 464-65.

3. Asserted Interests Were Not Compelling.

Although *Buckley* involved candidates, contributions, and expenditures, none of which apply here, it provides guidance on possible interests:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office [("Information Interest")]. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contribu-

> tions and expenditures to the light of publicity [("Corruption Interest")]. . . . Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limits [("Enforcement Interest")]."

Id. at 66-68. *Buckley*'s Information Interest is focused on "campaign money," not involved in petition signing. And the Corruption and Enforcement interests are unique to candidate elections and cannot justify public disclosure of petition signers. *See Bellotti*, 435 U.S. at 789-90; *Canyon Ferry*, 556 F.3d at 1031-32; *CPLC-I*, 328 F.3d at 1105 n.23.

a. No Information Interest Is Compelling

The State asserts an information interest in publicizing names and contact information of petition signers. This interest is not compelling.

First, the Information Interest is not absolute. It is designed to disclose who has demonstrated an interest in a referendum through contributions and expenditures. *See Canyon Ferry*, 556 F.3d at 1032-33. It is not designed to advise the public who might generally favor or oppose referenda (even if merely signing a petition reliably indicated that, *see infra*). An information interest that broad could justify requiring petition signers to disclose religious affiliation or income because such data could play a role in the voter's decision-making process. That would be extremely burdensome and chilling.

Second, the interest is compelling only if the information conveyed to the voters is significant. Marginal information gains cannot justify the substantial burdens imposed by compelled disclosure of the identi-

ties of 138,000 individuals.[18] This is especially important in the petition context where signatures may not reveal support or opposition because signers state only that an issue is too important to be left to legislatures. (App.42a.) Thus, disclosing petition signers may spread misinformation about who supports or opposes referenda. So the State lacks a compelling information interest in publicly disclosing petition signers.

b. No Anti-Fraud Interest Is Compelling.

The State asserts an anti-fraud interest that must also fail. First, fraud is a lesser concern during signature gathering than while voting. *Meyer*, 486 U.S. at 427-28. This is due to the justification for petition requirements—ensuring that issues have sufficient support to warrant the cost and effort of placing referenda on the ballot. At the petition stage, the question is merely whether the people should have the final say. Proponents failing to collect enough signatures would likely see their referendum fail at the polls.[19] This provides little incentive for fraud during petition circulation, especially given the potentially severe criminal penalties. RCW §§ 29A.84.210; 29A.84.230; 29A.84.250. Second, prosecution for fraud in petitions is rare. *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000) (two in seven years). More importantly, such fraud was detected with traditional methods (signature compari-

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[18] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (remedy must alleviate problem in "direct and material way.").

[19] In Washington, a referendum petition must collect signatures equal to or exceeding four percent of the signatures cast for governor at the previous gubernatorial election. Wash. Const., art. II, § 1(b).

son), public disclosure playing no part. *Id.* Third, although petitions have been released in recent years, the State has produced no fraudulent signature detected as a result of such public release.[20] This interest is not compelling.

4. Public Disclosure Is Not Narrowly Tailored And There Are Less-Restrictive Means.

Even if the asserted interests were compelling, public disclosure of petition signers is not narrowly tailored, and there are less-restrictive means of advancing any interest, making compelled disclosure of petition signers' identity and beliefs unconstitutional.

a. Public Disclosure Is Not Narrowly Tailored to Any Information Interest.

Any information interest is more directly served through tailored regulations. There is already adequate public information about *proponents* and *financial* supporters. *See generally* RCW § 42.17.010 (campaign finance act). *See also* Washington Secretary of State, *Filing Initiatives and Referenda in Washington State: 2009 Through 2012*, at 6 (2009) (first step to start referendum is registration with campaign finance commission). Washington's long history of not publicly disclosing petition signers, *see supra* at 2-4, reveals that this more narrowly tailored approach adequately served any information (and anti-fraud) interest.

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[20] Even if the State were able to produce such evidence, a single fraudulent signature detected through the public release of a referendum petition is unlikely to justify the burdens that such disclosure represents. *See Turner Broad. Sys.*, 512 U.S. at 664 (remedy must alleviate problem in "direct and *material* way") (emphasis added).

Even as to *contributions*, states may not require disclosure of contributors of de minimis amounts to ballot measure campaigns. *Canyon Ferry*, 556 F.3d at 1034. The interest in compelling public disclosure of *petition signers*' identity and beliefs is less weighty, so states cannot compel petition disclosure of petition signers' identity and beliefs under the First Amendment. *Id.* As Judge Noonan asked in concurrence, *id.* at 1036, "How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'" Here one could ask, "How the names of petition signers affect anyone else's vote? Does any voter exclaim, "Hank Jones signed the petition. I must be against it!"

b. Public Disclosure Is Not Narrowly Tailored to Any Anti-Fraud Interest.

Any anti-fraud interest is met by narrowly-tailored, less-restrictive means. First, there is limited, private disclosure to the government for signature verification. Only the Secretary has authority to canvass and verify petition signatures.[21] RCW § 29A.72.230. This serves the State's interest in ensuring that sufficient voters support the referendum. Since there is no mechanism allowing individual challenges to petition signatures on the referendum petitions, the assertion that individuals will check fraud rings hollow. The integrity of the election process is protected by the Secretary who verifies signatures, by observers who ensure proper procedures, and by potential subsequent judicial review. *See supra* at 2-3. The fact that public disclosure occurs under the PRA, not the elections code, illustrates the weakness of the asserted interest. If the goal

[21] *See supra* n. 3.

were to allow for public assistance in the signature verification process, one would expect the elections code to mandate public disclosure and provide procedures for submitting contested names. And while Washington has released petitions, it cites no instance where release yielded detection of a fraudulent signature. *See Washington Initiatives Now*, 213 F.3d at 1139.

Second, if Washington truly believes that its Secretary cannot be trusted to verify signatures, that its scheme of monitors and court review is inadequate to provide a check on the Secretary, and that citizens are needed for an independent canvass and verification, it could create some special mechanism for doing so while protecting privacy so as not to chill speech and association. It could randomly select citizen panels, along the lines of a grand jury, with members bound to secrecy in doing an independent canvass and verification.

Third, there are criminal penalties. The State has failed to demonstrate that the criminal penalties, *see* RCW §§ 29A.84.210; 29A.84.230; 29A.84.250, are inadequate to deter fraud. *See WRTL-II*, 551 U.S. at 479 (rejecting "prophylaxis-upon-prophylaxis approach"); *Buckley*, 424 U.S. at 56 ("There is no indication that the substantial criminal penalties for violating [the Act] combined with the political repercussion of such violations will be insufficient to police [the Act]."). The fact that fraud prosecutions have been rare, *Washington Initiatives Now*, 213 F.3d at 1139, indicates that penalties are adequately serving any anti-fraud interest.

The State failed to prove that public disclosure of petition signers' identity and beliefs is narrowly

tailored to an anti-fraud interest, and it has failed to show that less-restrictive means are inadequate.

In sum, the State failed to meet its burden of proving that public disclosure of petition signers is narrowly tailored to any compelling interest. Consequently, Petitioners had likely success on the merits of their claim.

B. Petitioners Met the Other Elements for a Preliminary Injunction.

In First Amendment cases, meeting the other preliminary-injunction elements essentially follows the likelihood of success on the merits. Where it is likely that one will succeed in proving that privacy of petition signers' speech, association, and belief is protected by the First Amendment, there is irreparable harm if that privacy is violated by compelled speech, the government has no interest in violating constitutional rights, and enforcing constitutional liberties is clearly in the public interests. These elements are considered briefly below.

1. Speech-Protective Standards Control.

Because this is a First Amendment preliminary-injunction case, it provides this Court the opportunity to apply its standards set out in *Winter*, 129 S. Ct. 365, to the free speech, association, and belief context. Where these are involved, preliminary injunction standards must be speech- and association-protective. While fuller briefing must await merits briefing, here is a brief list of protections that should be, but are not regularly, afforded in First Amendment cases.

First, preliminary injunction standards involving expressive association must reflect our constitutional principles that "[i]n a republic . . . the people are

sovereign," *Buckley*, 424 U.S. at 14, and there is a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (citation omitted). So the First Amendment's presumption of "no law," i.e., "freedom of speech" and expressive association, must be the constitutional *default* and the overriding *presumption* where expressive association is at issue.

Second, this presumption means that First Amendment protections must be incorporated into the preliminary injunction standards, not limited to merits consideration. So if exacting or strict scrutiny applies, as here, the preliminary-injunction burden shifts to the state to prove the elements of strict scrutiny and show the inadequacy of proffered less-restrictive means. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).

Third, because exacting or strict scrutiny is the antithesis of deference or a presumption of constitutionality, no deference or favorable presumption must be afforded the regulation of speech in preliminary injunction balancing.

Fourth, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL-II*, 551 U.S. at 474.

Fifth, state officials have no per se interest in regulating expressive association. Their first loyalty should be to the First Amendment. Beyond that, their only interest is in enforcing the laws *as they exist*, with any interest in the particular *content* of those laws being beyond their interest in the preliminary injunction balancing of harms.

Sixth, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal citation omitted).[22] Against this need for proof of real harm if a law of questionable constitutionality is preliminarily enjoined is the paramount fact that the protection of First Amendment rights is very much in the public's interest.

Seventh, the status quo to be preserved in a First Amendment case must be the freedom of speech before the governmental restriction. If the protected status quo is the restriction, government may simultaneously violate free speech and association and shield itself from preliminary injunctions.

2. Plaintiffs Had Irreparable Harm.

If the identity and beliefs of petition signers had been publicly disclosed, their First Amendment right to privacy in speech, association, and belief would have been immediately and irreparably harmed because such compelled disclosure was not narrowly tailored to a compelling interest. And if Plaintiffs had not received judicial protection, they would have suffered the irreparable injury of a reasonable probability of

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[22] S*ee also Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 803 n. 22 (1984) ("[This Court] may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity."). *FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001) (same); *see also id.* at 192 (FEC may not *speculate* that NRA received more because it did not record contributions of under $500, citing *Turner*, 512 U.S. at 664).

threats, harassment, and reprisals, which would also have chilled future participation in core political activity.

"Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: 'The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976); s*ee also Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (*quoting Elrod*); *Brown v. Cal. Dept. of Transportation*, 32 F.3d 1217, 1226 (9th Cir. 2003) (noting that a risk of irreparable injury may be presumed when Plaintiffs state a colorable First Amendment claim); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.").

3. Balancing Equities Favored Petitioners.

In the Ninth Circuit, "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellants'] favor." *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotations and citations omitted). This is true even where "the merits of the constitutional claim were not clearly established at this early stage in the litigation," *id.* (internal quotations and citations omitted), although they were clearly established in the present

case. This speech- and association-protective standard should govern First Amendment cases.

Here, once the names of the petition signers were released to groups indicating they would place petition signers' names on the Internet, would contact signers, and would encourage harassment of signers, the First Amendment rights of those who signed the Referendum 71 petition would have been violated. Considering the anemic nature of the interests asserted in this context, a balance of harms favored Petitioners in this First Amendment context.

4. An Injunction Served the Public Interest.

The Ninth Circuit has recognized that "'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Sammartano*, 303 F.3d at 974 (*quoting G & V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir.1994)). While the public interest in protecting First Amendment liberties has, on occasion, been overcome by "a strong showing of other competing public interests," *Sammartano*, 303 F.3d at 974, there must be *some showing* of an *actual*, strong competing interest in order for a court to find that it is in the public interest to deny injunctive relief. *Id*. (noting lack of plausible justification).

In the present case, there was no interest—strong or otherwise—to justify the challenged public disclosure of petition signers' identity and beliefs. It is in the public interest that First Amendment freedoms be preserved.

Conclusion

This case may be decided on very narrow grounds. The State asserts anti-fraud and information interests, but these are weak (if even existent) in the context of publicly disclosing petition signers' identity and beliefs. This case involves a referendum, so there is no corruption concern. It involves no contributions or expenditures, so there is no money to follow. It is not even about whether a referendum should be passed, only whether it should be on the ballot (and some may support it being on the ballot without stating a position on the ultimate issue). Any state interest may be accommodated by *private* disclosure (to government authorities) instead of *public* disclosure. Consequently, the First Amendment right to privacy in speech, association, and belief protects against the public disclosure of petition signers' identity and beliefs. For the reasons stated, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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